

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of Parts 21 and 74 of)
the Commission's Rules With Regard)
to Filing Procedures in the)
Multipoint Distribution Service)
and in the Instructional)
Television Fixed Service)
)
and)
)
Implementation of Section 309(j))
of the Communications Act --)
Competitive Bidding.)

MM Docket No. 94-131

DOCKET FILE COPY ORIGINAL

PP Docket No. 93-253

To: The Commission.

COMMENTS OF HEARTLAND WIRELESS COMMUNICATIONS, INC.

**HEARTLAND WIRELESS
COMMUNICATIONS, INC.**

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Dated: January 23, 1995

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SUMMARY

Heartland Wireless Communications, Inc. ("Heartland"), a leading provider of wireless cable services in the United States, hereby submits its Comments in response to the Notice of Proposed Rulemaking ("Notice") in MM Docket No. 94-131. In this proceeding, the Federal Communications Commission proposes a new framework for the future licensing of MDS applications.

Heartland supports the implementation of a national filing window for incumbent wireless cable providers with a ten channel eligibility standard. Subsequent windows would be open to all applicants. Heartland believes that the Commission should continue to allocate MDS channels based on the existing engineering rules, rather than by pre-determined geographic areas. Heartland also supports the use of sequential oral auctions as the most efficient and logical auction design for MDS.

Heartland believes that any new rules adopted in this proceeding should encourage the development and expansion of legitimate wireless cable operations.

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Heartland Wireless Communications, Inc. ("Heartland"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, hereby submits these Comments in the Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.^{1/}

I. Statement of Interest

Heartland is a publicly-traded company that currently operates fourteen wireless cable systems serving over 23,000 subscribers, thus making it one of the largest wireless cable operators in the U.S. Heartland recently completed the acquisition of over 150 ITFS lease interests from RuralVision Joint Venture and is currently preparing to construct a number of

^{1/} Notice of Proposed Rulemaking in MM Docket No. 94-131 and PP Docket No. 93-253, FCC 94-293 (released December 1, 1994).

additional wireless cable systems. In conjunction with its ITFS lessors, Heartland plans to promptly bring educational and entertainment programming to rural areas currently underserved by other video programming providers. Heartland is also an MDS licensee and will most certainly be an applicant for additional MDS facilities, which are to be used in conjunction with these ITFS facilities.

In short, Heartland is a significant entity in the wireless cable industry. Its success in this field has been largely due to its sound relations with its ITFS lessors; however, in order to further expand its service offerings, Heartland will continue to need access to the commercial MDS channels. As the Commission is well aware, the abundance of speculative MDS applications, unperfected and unconstructed MDS conditional licenses, and processing delays have made it difficult for legitimate wireless cable entities to gain access to a sufficient number of MDS channels and to compete effectively against wireline cable operators. The proposals contained in the Notice will have an immediate impact upon Heartland's ability to gain access to needed MDS channels, and will therefore greatly affect Heartland's business.

Heartland applauds the FCC's stated goal of facilitating the development of the wireless cable industry. The Commission has already made tremendous strides in improving the process by moving the MDS processing to the Mass Media Bureau. Nonetheless,

Heartland urges the Commission to devote sufficient resources to ensure the continued processing and granting of long-pending applications. The instant proceeding will further improve the FCC's processing and thus, the wireless cable industry as a whole. Accordingly, Heartland is pleased to have the opportunity to submit these Comments.

II. Summary of the Notice

The Notice proposes to lift the current freeze on the filing of applications for new MDS station licenses and sets forth several alternative filing procedures for the new applications.

The Notice further proposed to modify the "long form" for MDS applications to consolidate information from current FCC Form 494 and FCC Form 430, in order to create a new form conducive to electronic filing. The Commission also sought comment on auction procedures for future MDS applications, including the appropriate auction design, preferences for designated entities, and payment issues.

III. Discussion

A. Filing Procedures

Heartland urges the Commission to adopt an alternate filing procedure to the stated preferred approach at paragraph 6 of the Notice. Specifically, Heartland believes it is ill-advised to adopt a procedure whereby new MDS applications are filed for pre-determined geographic areas (i.e., MSA's, RSA's or ADI's). Heartland maintains that the problems with such an approach, as

set forth below, outweigh the stated benefit of quicker licensing.

The first problem with adopting a procedure for filing new MDS applications for pre-determined geographic areas is that it would result in newly authorized systems which are different and most likely incompatible with previously-authorized MDS facilities. Second, the boundaries of an already defined viable wireless cable market may well cross MSA or RSA boundaries, thereby making it difficult to serve areas with the greatest population without spilling into adjacent geographic markets. A third problem with a geographic area filing approach is that newly authorized wireless cable facilities would be confronted with existing MDS licensees, which would make modifications to new facilities nearly impossible to accomplish in many instances in light of the grandfathered MDS station's protected service area. Fourth, filing for pre-determined geographic areas will likely attract speculative applications as it is easier for unscrupulous marketers/application mills to "sell" an already defined market (i.e., the "Washington, D.C. Rural Service Area") without regard to engineering around the grandfathered MDS stations.

Consequently, Heartland suggests retaining the existing engineering separation criteria for new MDS stations to (i) provide for continuity in the natural build-out of the wireless cable industry and existing systems; (ii) avoid the problems

associated with different geographic licensing schemes within one industry; and (iii) avoid unnecessarily limiting the ability of wireless cable to continue to compete effectively with wireline cable due to new and more complicated strategy issues for completing partially constructed systems (i.e., those systems with fewer than the maximum number of available MDS/ITFS channels).

B. Heartland Supports National Filing Window Proposals.

Heartland urges the FCC to adopt its stated alternate proposal to open windows periodically for filing new MDS applications. Under this proposal, currently used for low power television service, the FCC would announce a filing window for available channels. There would be no geographic restrictions under this approach; rather, interested parties would file a long-form application using the current MDS engineering rules to demonstrate the viability of the proposed station.

Heartland believes that this approach would be much less disruptive to the wireless cable industry than the pre-determined geographic area approach. Heartland recognizes the trade-off of a potentially slower licensing process. Heartland also recognizes, however, that the industry needs to move forward expeditiously and not become subject to a wholly new and complicated licensing process, which will require years of adaptation. The national filing window approach will permit serious wireless cable operators to easily incorporate newly-

authorized facilities into their existing facilities.

Conversely, wireless cable operators will be forced to work with an entire new set of parameters if the Commission changes course mid-stream and adopts an approach which uses pre-determined geographic areas.

C. Heartland Supports a "First Window" for Incumbents with a "Critical Mass" of Ten Licensed or Leased Channels.

Heartland supports the Commission's "first window" filing approach for those incumbent MDS licensees/lessees with a "critical mass" of at least ten currently authorized MDS channels or leased airtime on ITFS channels. Under this approach, the Commission would open a window in which new MDS applications could be filed by entities having access by lease or license to ten or more MDS or ITFS channels to be used in conjunction with the newly requested MDS channels. This approach will enable the Commission to license the greatest number of vacant MDS channels to legitimate wireless cable operators and deter speculators.

Heartland submits that this approach, which clearly favors incumbent wireless cable operators who have already demonstrated their commitment to investing in the wireless cable industry, is more than justified since there are a relatively small number of entities who have endured the long and difficult struggle to amass even a "critical mass" of ten channels. These entities have infused tens of millions of dollars into this industry and deserve an opportunity to complete many systems which are

currently short of enough channels to compete effectively with the wired cable company in any given market. Moreover, this benefit to incumbents with a "critical mass" is in the public interest because it will help to ensure the viability of the wireless cable industry as a whole since there will be a greater number of "complete" and viable wireless cable systems. In addition, competition, which is clearly in the public interest will be introduced into the marketplace much more quickly if incumbents are given an opportunity to file for new MDS stations first. In fact, the wired cable companies would like nothing more than for the FCC to lift the freeze and allow any applicant the opportunity to file for remaining MDS channels since that action would further delay the wireless cable incumbents from obtaining additional channels.

Heartland supports ten channels as the "critical mass" because any entity with licenses or lease rights to ten channels is more than likely not a "speculator." Fewer channels (e.g., 4-8) may be amassed quite easily by a speculator who simply filed a few applications in a given market. Given the past processing of MDS, however, it is unlikely that many speculators filed multiple acceptable applications in a market that resulted in the grant of licenses. A further advantage to designating ten as the "critical mass" is that it deters the number of entities eligible to participate in any one auction to a maximum of three. Thus, even if speculators were inclined to continue filing new MDS

applications, they would be limited to a maximum of three in any one market. This is not to say that legitimate entities only interested in a fewer number of MDS channels would not have an opportunity to file for such channels. Rather, the existing incumbent licensees/lessees meeting the established "critical mass" would merely be given the first opportunity to obtain the necessary channels to complete their systems.

D. Mutually Exclusivity

Should there be any instances of mutually exclusive applications during the first window, Heartland believes that the Commission should allow the parties involved to negotiate a settlement agreement whereby potential interference issues raised by the mutual exclusivity are resolved. Permitting such negotiations will increase the number of channels licensed and ultimately will further the Commission's goal of increasing the availability of wireless cable service to the public.

E. Auction Design: Heartland Supports the Use of Sequential Oral Auctions

The Notice requests comments on which competitive design is most appropriate for MDS. Heartland urges the Commission to adopt multiple round sequential "open outcry" auctions. The Commission used this auction design in the Interactive Video and Data Services auctions last year and it proved to be efficient and successful for those licenses which had little interdependence on one another. Similarly, MDS licenses are not

dependent on licenses in other geographic areas to enhance their value. Existing wireless cable operators will certainly want to obtain the remaining MDS channels in their respective markets. They do not, however, need to know what their competitors in the industry are paying for similar channels in other parts of the country. Consequently, the most efficient and logical auction design for MDS is sequential oral auctions.

Heartland urges the Commission to adopt multiple round versus single round bidding for many of the reasons specified as "advantages" to this type of auction in the *Second Report and Order*. Most notably, the information that multiple round auctions provide bidders regarding the value that other bidders place on licenses is helpful in establishing top bids. See *Second Report and Order*, 9 FCC Rcd 2348 (1994), *recon*, granted in part, *Second Memorandum Opinion and Order*, FCC No.94-215 (released Aug. 15, 1994). This information will help to ensure that the MDS licenses are ultimately granted to the party that values them most in any given market. The greatest disadvantage of using a single round auction design, is that the party who most highly values a given license may not win that license.

Heartland strongly believes that future MDS licenses should be auctioned sequentially as opposed to simultaneously. Assuming that the Commission adopts Heartland's proposal that incumbents with a "critical mass" of at least ten channels are permitted to apply for the remaining MDS licenses before other parties are

permitted to do so, there will be a small number of parties bidding on any one license and the auctions will move along very quickly. Thus, a pure sequential auction (i.e., licenses auctioned one at a time) can be used with the result being an efficient, inexpensive auction.

Finally, Heartland believes that the sequential auctions should be oral versus sealed. This type of auction will result in the Commission most closely achieving its stated goals in the auctioning of mutually exclusive applications; that is, the party that most highly values the license should have the opportunity to pay that value and win the license. A sealed bid approach deprives bidders from knowing what value their competitors place on a license. Therefore, the best auction design for MDS is sequential oral auctions.

IV. Conclusions

Heartland urges the Commission to adopt rules that will facilitate the further development of MDS by rewarding the efforts of existing, legitimate wireless cable operators. The Commission should grant these operators a preference in obtaining new MDS licenses by implementing the first window approach with a ten channel eligibility standard. Moreover, licenses should be allocated based upon existing engineering rules rather than upon geographical boundaries. Finally, the Commission should implement multiple round sequential oral auctions as the most efficient and logical design for MDS.

WHEREFORE, the foregoing premises considered, Heartland Wireless Communications, Inc. respectfully requests the Commission to promulgate rules in this proceeding consistent with the foregoing Comments.

Respectfully Submitted,

**HEARTLAND WIRELESS
COMMUNICATIONS, INC.**

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